D.N. X07-HHD-CV17-6086134-S

CITY OF NEW HAVEN,	)	SUPERIOR COURT
	)	
Plaintiff,	)	COMPLEX LITIGATION DOCKET
	)	
v.	)	AT HARTFORD
	)	
PURDUE PHARMA L.P., d/b/a PURDUE PHARMA (DELAWARE) LIMITED PARTNERSHIP, *et al.*,	)	
	)	
Defendants.	)	January 4, 2018

MEMORANDUM OF LAW OF DEFENDANTS AMERISOURCEBERGEN CORPORATION, MCKESSON CORPORATION AND CARDINAL HEALTH, INC. IN SUPPORT OF MOTION TO DISMISS

Under Connecticut law, a party has standing to bring an action only if it has suffered a "direct injury." That is, the plaintiff must show that the defendant's conduct ***directly*** caused its injuries. By contrast, injuries far removed from the defendant's conduct or ones that derive from injuries to others are insufficient to confer standing. Despite this requirement, the City of New Haven (the "City") seeks damages for costs associated with providing municipal services to combat opioid addiction, which the City alleges AmerisourceBergen Corporation, McKesson Corporation, and Cardinal Health, Inc. (collectively, the "Distributors")[1] indirectly contributed to by shipping opioids to the City in "suspicious" quantities. Even taking these allegations as true, the City lacks standing to bring this action because its injuries are too remote from the Distributors' alleged conduct and are instead derivative of injuries to the City's residents on whose behalf the City lacks statutory authority to sue.[2]

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[1] By submitting this motion, Defendants AmerisourceBergen Corporation and Cardinal Health, Inc. do not concede that they are proper parties to this litigation.

[2] The Distributors dispute that they directly cause those residents to suffer an injury.

The outcome here is controlled by the Connecticut Supreme Court's decision in *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 780 A.2d 98 (2001). There, the City of Bridgeport sued gun manufacturers and retail sellers for costs of municipal services relating to gun violence. Specifically, Bridgeport alleged that it had incurred substantial costs in providing emergency services, health care, and social service programs to victims of gun violence, and increased expenditures for policing and prosecution of those caught up in the criminal justice system. The Supreme Court rejected the City's assertion of standing. Observing the "numerous steps" between the defendants' conduct and Bridgeport's injuries and that Bridgeport's residents, not Bridgeport itself, were the "primary victims" of gun violence, *id.* at 355, the Court held that any injuries suffered by Bridgeport were "too remote, indirect and derivative with respect to the defendants' alleged conduct" to create standing, *id.* at 344. The Court further held that Bridgeport lacked authority to bring its action absent an express delegation from the State, and that Connecticut's Home Rule Act did not confer such authority. *Id.* at 367. On these grounds, the Court affirmed the dismissal of Bridgeport's action for lack of standing.

This case is a replay of *Ganim* in all relevant respects and should be dismissed for three principal reasons. First, the City lacks standing because its alleged injuries—increased costs for municipal services—are indirect, remote, and derivative as they relate to the Distributors' alleged conduct. As in *Ganim*, numerous events and other actors between the Distributors' distribution of a legal product and the City's alleged injuries caused by others' misuse of that product renders any purported relation between them too remote to confer standing on the City. Indeed, the Distributors are merely wholesalers that supply prescription drugs to retail pharmacies. Before those products could conceivably cause any of the injuries the City identifies, manufacturers must first author the prescribing information about opioid medications and dispatch the sales

representatives who promote their use to doctors, doctors must then meet patients face-to-face and provide them with prescriptions, pharmacists must personally encounter the patients and dispense the medications, and the patients, in turn, must then either use the medications as directed—or unlawfully divert them by selling the drugs or allowing others to use them. The "sheer number of links in the chain of causation" compel the conclusion that the City's injuries are, at best, "derivative of those suffered by the various actors in between the defendants and the plaintiffs." *See Ganim*, 258 Conn. at 355 (quotation marks omitted).

Second, the City has not pled any statutory authority or basis otherwise that would confer standing. Although the City asserts that it has such authority under the Home Rule Act, the Supreme Court squarely rejected the same argument in *Ganim*, holding that the Act does not authorize a municipality to sue on its citizens' behalf in these circumstances. Similarly, contrary to its allegations, the City does not have *parens patriae* authority to sue absent an express delegation from the State, which has not occurred.

Third, the municipal cost recovery doctrine, which provides that public expenditures made in the performance of governmental functions are not recoverable, independently bars the City's action because the City's alleged damages are all based on increased costs of municipal services.

Finally, even if the City was able to overcome the aforementioned standing issues that would result in dismissal of the action, it nonetheless lacks standing to pursue its Connecticut Unfair Trade Practices ("CUTPA") claim because it lacks a necessary business relationship with the Distributors, and because as the Supreme Court ruled in *Ganim*, CUTPA is also subject to the remoteness doctrine as a limitation on standing.

In short, the City has neither standing nor authority to bring this action against the Distributors, and its action as to them should therefore be dismissed.

THE ALLEGATIONS OF THE COMPLAINT

The City brings this action against both manufacturers and Distributors of prescription opioids. Complaint (Oct. 25, 2017) (the "Complaint" or "Compl.") at ¶¶ 1, 7. Against the Distributors, the City alleges causes of action for (i) public nuisance; (ii) violation of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a *et seq.*; (iii) common law fraud; (iv) negligence; and (v) unjust enrichment. *Id.* at Counts I, III, V, VII & VIII.

As the Complaint concedes, distribution of prescription opioids is regulated by the Drug Enforcement Administration ("DEA"). *Id.* at ¶¶ 8-9. The Distributors do not dispense these drugs to patients, *id.* at ¶¶ 65-67, but rather sell them only to DEA-registered pharmacies, which by law may dispense them only to patients who present a legitimate prescription from a DEA-registered medical practitioner. *See id.*; 21 U.S.C. § 829. This system is commonly referred to as "closed" because every participant (other than the patient) is registered with and regulated by the DEA. *See* 21 U.S.C. §§ 821–31.

The Complaint is notable for what it does not allege. It does not allege that the Distributors sold prescription opioids to pharmacies not registered with the DEA or to anyone else outside the closed system. And it does not allege that the Distributors failed to maintain physical security of the drugs. Nor does it allege that the Distributors failed, as required, to report to DEA all sales of opioid medications made to retail pharmacies (thus enabling DEA to determine the total amount of such medications supplied to pharmacies in the City).

Most important for this motion, the Complaint also does not allege that the City suffered harm caused directly by the Distributors. Instead, the Complaint indicates that the City's

residents suffered direct harm from "black market diversion" of opioid medications, *id.* at ¶¶ 169; 276-84, allegedly aided by the Distributors' failure to detect and report to DEA and state authorities "suspicious quantities" of prescription opioids into New Haven, *id.*at ¶ 289. And the Complaint claims that the City itself suffered indirect harm in spending monies to address the addiction and addiction-related conduct of its citizens (*i.e.*, for City-funded health insurance and workmen's compensation programs, drug testing costs, cost to the criminal justice system, the "cost of governmental payor programs," "cost[s] for prescription drugs, including opioids," expenditures for "health services for the treatment of addiction and overdoses," "increased law enforcement and fire rescue" costs, "costs for social services" and "costs of governmental services intended for children, families, youth and other residents of the City of New Haven,"), *id.* at ¶¶ 276-85; 303; 312; 324.

As discussed below, the City's allegations are insufficient to survive a motion to dismiss.

THE LEGAL STANDARD

Pursuant to Connecticut Practice Book § 10-30(a)(1), a party may move to dismiss a complaint for lack of subject matter jurisdiction. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court . . . ." *Caruso v. Bridgeport*, 285 Conn. 618, 627, 941 A.2d 266 (2008); *R.C. Equity Group, LLC v. Zoning Comm'n*, 285 Conn. 240, 248, 939 A.2d 1122 (2008).

"A court does not have subject matter jurisdiction to hear a matter unless the plaintiff has standing to bring the action." *Western Boot & Clothing Co. v. L'Enfance Magique, Inc.*, 81 Conn. App. 486, 488, 840 A.2d 574, *cert. denied*, 269 Conn. 903, 852 A.2d 737 (2004). Like

any other party, a municipal corporation, such as the City, is required to have standing to bring an action. *See* 17 McQuillin Mun. Corp. § 49:2 (3d ed.).

The burden of establishing standing is on the plaintiff. *See Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n of Town of Newtown*, 285 Conn. 381, 395, 941 A.2d 868 (2008). "Standing is established by showing that the party claiming it is authorized by statute to bring an action, in other words, statutorily aggrieved, or is classically aggrieved." *Wesley v. Schaller Subaru, Inc.*, 277 Conn. 526, 538, 893 A.2d 389 (2006) (internal quotation marks omitted.). In other words, "there must be a colorable claim of a direct injury to the plaintiff, in an individual or representative capacity." *Ganim*, 258 Conn. at 346. "The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue. . . . [I]f the injuries claimed by the plaintiff are remote, indirect or derivative with respect to the defendant's conduct, the plaintiff is not the proper party to assert them and lacks standing to do so. Where, for example, the harms asserted to have been suffered directly by a plaintiff are in reality derivative of injuries to a third party, the injuries are not direct but are indirect, and the plaintiff has no standing to assert them." *Id.* at 347-48.

ARGUMENT

I. The City Lacks Standing Because Its Claims Are Derivative.

The Complaint alleges only indirect injury to the City—that the Distributors' alleged failure to monitor, report, and prevent "suspicious orders" of prescription opioids has resulted in opioid over-use, illegal use or sale, addiction, overdoses, physical and psychological dependence, death, and injury ***to the residents of New Haven***. Compl. at ¶¶ 1; 10; 16-17 (emphasis added). Only as a result of the alleged personal injuries suffered by New Haven residents has the City

allegedly been damaged by increased municipal costs for police, fire, and other first responders, City-funded health insurance and workmen's compensation programs, health services for treatment of addiction and overdoses, social services related to addiction, governmental services for families of New Haven, and increased costs to the criminal justice system. *Id.* at ¶¶ 276-85; 303; 312; 324. Such indirect, derivative alleged harms do not to establish standing.

A. *Ganim*

The Connecticut Supreme Court's decision in *Ganim* is controlling and requires dismissal of this action as to the Distributors. In *Ganim*, Bridgeport and its mayor brought an action against gun manufacturers, trade associations, and retail sellers for damages caused by acts of gun violence, including the same types of increased municipal expenditures at issue here. See *id.* at 326-28.

The trial court in *Ganim* dismissed the complaint, holding that Bridgeport's claims were derivative and too remote from the defendants' alleged conduct. *Ganim v. Smith & Wesson Corp.*, No. CV 990153198S, 1999 WL 1241909, at *9-10 (Conn. Super. Dec. 10, 1999). The trial court relied on the common law principle that a plaintiff cannot recover damages for harm caused to a third party: "[I]t is recognized at common law that a plaintiff who complains of harm resulting from misfortune visited upon a third person is generally held to stand at too remote a distance to recover."[3] The issue, then, was "whether the damages a plaintiff sustains are derivative of an injury to a third party. If so, then the injury is indirect; if not, it is direct." *Id.* at *9. The trial court therefore concluded:

[3] *Id. at* *4 (citing *Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258, 268-69, 112 S. Ct. 1311, 117 L.Ed.2d 532 (1992); *Laborers Local 17 Health Benefit Fund v. Phillip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999); *Conn. Mut. Life Ins. Co. v. New York & New Haven R. Co.*, 25 Conn. 265, 276 (1856); *Maloney v. Pac*, 183 Conn. 313, 321, 439 A.2d 349 (1981); *Stamford Hosp. v. Vega*, 236 Conn. 821, 659, 674 A.2d 821 (1996); *Third Taxing District v. Lyons*, 35 Conn. App. 795, 798, 647 A.2d 32, cert. denied, 231 Conn. 936, 650 A.2d 173 (1994)).

> ***Damages that are derivative of harm suffered by third parties, being the citizens of Bridgeport in this case, are indirect and too remote to be recoverable by these plaintiffs under common law tort principles***. Consequently, because [the] defendants' alleged misconduct did not proximately cause the injuries alleged, [the] plaintiffs lack standing to bring [their common law tort] claims against [these] defendants.

Id. at *9-10 (internal citations and quotation marks omitted) (emphasis added).

The Connecticut Supreme Court affirmed. *Ganim*, 258 Conn. at 351-65. The Court agreed that Bridgeport's claims were derivative: "[T]he harms suffered by the plaintiffs are derivative of those suffered by the various actors in between the defendants and the plaintiffs. For example, the plaintiffs would not suffer the harm of increased costs for various municipal services but for the fact that certain of the residents of Bridgeport had been the primary victims of the defendants' misfeasance." *Id.* at 355.

The Supreme Court concluded that Bridgeport's alleged damages were too indirect and remote from the defendants' conduct to establish standing based on the United States Supreme Court's three-part analysis in *Holmes v. Securities Investor Protection Corp.*:

> First, the more indirect an injury is, the more difficult it becomes to determine the amount of plaintiff's damages attributable to the wrongdoing as opposed to other, independent factors. Second, recognizing claims by the indirectly injured would require courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, in order to avoid the risk of multiple recoveries. Third, struggling with the first two problems is unnecessary where there are directly injured parties who can remedy the harm without these attendant problems.

Id. at 353.

With respect to the first factor—directness of the injury—the Supreme Court explained that "[i]t cannot be denied that factors other than the defendants' manufacture, advertisement, distribution and retail sales of guns contribute in significant measure to the various harms claimed by the plaintiffs" and that "[i]t would require us to blink at reality to minimize the

enormous difficulty to be encountered in attempting reliably to separate out the contribution of the defendants' conduct to those harms from these other, independent factors." *Id.* at 357. The Court then set forth other factors that contribute to gun violence.[4]

With respect to the second factor—difficulty of apportioning damages among injured parties at different levels removed from the alleged conduct—the Supreme Court observed that the harm suffered by the "potential other plaintiffs," notably, the primary victims, "exists at a level less removed from the alleged actions of the defendants," *id.* at 359, and concluded: "How . . . the damages suffered by these groups of potential plaintiffs would be apportioned with respect to the damages sought by the plaintiffs in the present case, in order to avoid double recoveries and double liabilities for the same losses, would present a daunting question to any court." *Id.*

And with respect to the third factor—presence of directly injured parties who can seek recourse for the alleged misconduct—the Supreme Court explained that the unidentified Bridgeport residents who had been injured by gun violence could, "without the attendant problems referred to, remedy the harms directly caused by the defendants' conduct and thereby obtain compensation . . . ." *Id.* That the directly injured parties could obtain relief "greatly

[4] These other factors included: "The scourge of illegal drugs, poverty, illiteracy, inadequacies in the public educational system, the birth rates of unmarried teenagers, the disintegration of family relationships, the decades long trend of the middle class moving from city to suburb, the decades long movement of industry from the northeast 'rust belt' to the south and southwest, the swings of the national and state economies, the upward track of health costs generally, both at a state and national level, unemployment, and even the construction of the national interstate highway system, to name a few, reasonably may be regarded as contributing to Bridgeport's increased crime rate, including crimes committed with handguns, and assault and suicide rates, increased costs of municipal services, reduced tax base, loss of investment and development, and injuries to the communities that make up Bridgeport and to its quality of urban life." *Id.* at 356.

reduces the need for confronting the enormous difficulties in sorting out the questions of causation and damages demonstrated by the first two factors." *See id.*

Thus, as to all substantive claims, the Supreme Court held in *Ganim* that Bridgeport lacked standing because its injuries were "too remote from the defendants' misconduct, and are too derivative of the injuries of others." *Id.* at 365.

B. *Ganim* requires dismissal of the City's claims.

The City's claims against the Distributors cannot survive application of the Connecticut Supreme Court's analysis in *Ganim*. All three factors that the *Ganim* court considered weigh decisively in favor of dismissal.

First, the Distributors' alleged failure to report "suspicious" pharmacy orders was not the direct cause of the City's increased expenditures for dealing with the opioid addiction crisis. As in *Ganim*, there is a long chain of events between the Distributors' alleged conduct and the City's injuries, involving numerous steps and other intervening actors. The City itself alleges that manufacturers failed to adequately warn about the addictive properties of prescription opioids, like oxycodone and hydrocodone, and promoted their use as non-addictive. Clearly, too, "pill mills" wantonly prescribe drugs, and well-intentioned doctors prescribe drugs negligently. There also are pharmacies that dispense drugs despite indications they are being abused. And, not least, there is the contributing conduct of those who peddle drugs on the black market and the conduct of the addicts themselves. The report of the President's Commission on Combating Drug Addiction and the Opioid Crisis lists thirteen "[c]ontributors to the [c]urrent [c]risis" (none of which is failure to report "suspicious" pharmacy orders).[5] As in *Ganim*, these independent

[5] The Distributors request that the Court take judicial notice of these other contributing factors. *See* https://www.whitehouse.gov/sites/whitehouse.gov/files/images/FinalReport Draft 11-1-2017.pdf. *See supra* at n. 2 (discussing numerous independent contributing factors); Olga Khazan, *How Job Loss Can Lead to Drug Use*, The Atlantic (July 19, 2017), *available at*

contributing factors make it essentially impossible to "separate out the contribution of the defendants' conduct to those harms from these other, independent factors." *See Ganim*, 258 Conn. at 357.

That task would be especially difficult here because the Distributors have a more limited role in the supply chain than the gun manufacturers and sellers did in *Ganim*. The Distributors do not manufacture opioids or sell them to patients. *See* 21 U.S.C. § 829. They fill wholesale orders made by DEA-licensed pharmacies. *See* 21 U.S.C. §§ 822; 829. The quantities they can supply are limited in the aggregate by production quotas established for manufacturers by the DEA. *See* 21 U.S.C. § 826; 82 Fed. Reg. 51873-77. The pharmacies, in turn, may dispense prescription opioids only upon presentation of a legitimate prescription. Pharmacists have a "corresponding responsibility" to prevent diversion by filling only prescriptions issued in "the usual course of professional treatment." 21 CFR § 1306.04(a); *see also* 21 U.S.C. §§ 822; 829. A patient, of course, may obtain a prescription only from a licensed doctor, whose responsibility is to serve as a gate-keeper. *See id.* Without a criminal act—*i.e.*, violation of one or more of these regulations—there can be no diversion.[6]

As the *Ganim* Court recognized, separating out alleged contributions of intermediaries such as the Distributors is even more difficult where, as here, the alleged "misconduct constitutes

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https://www.theatlantic.com/health/archive/2017/07/how-job-loss-can-lead-to-drug-use/534087/; Beth Han, *et al., Prescription Opioid Use, Misuse, and Use Disorders in U.S. Adults: 2015 National Survey on Drug Use and Health*, Annals of Internal Medicine (Sept. 5, 2017), *available at* http://annals.org/aim/article-abstract/2646632/prescription-opioid-use-misuse-use-disorders-u-s-adults-2015.

[6] The criminal act that constitutes diversion can take many forms: a patient who obtains a medication under false pretense, a patient who diverts validly prescribed medicines, and theft of validly prescribed medications from a proper patient are all examples of ways that medication may be diverted from its proper use. Notably, this diversion occurs after wholesale distributors have shipped drugs to DEA-registered pharmacies and is beyond their control.

claimed failures to meet certain duties and obligations." 258 Conn. at 358. Although the City claims that the Distributors breached an alleged duty to report to the DEA and halt shipment of "suspicious" orders by New Haven pharmacies, Compl. at ¶¶ 9-10; 289-90, as the Supreme Court explained in *Ganim*, "[r]eliably ascertaining what the state of affairs would have been had those obligations been performed"—*i.e.*, what either the DEA would have done with the report or the unnamed pharmacies would have done to secure supplies from a different wholesaler—"complicates the calculus of attributable damages even more." *See Ganim*, 258 Conn. at 358.

Second, as in *Ganim*, the alleged personal injuries suffered by New Haven residents (who are not parties to this lawsuit) and the economic injury suffered by the City exist at different levels of remove from the Distributors' alleged conduct. Apportionment of damages among plaintiffs would therefore be a "daunting" task for a jury and creates the potential of awarding "double damages and double liabilities for the same losses." *Ganim*, 258 Conn. at 359. This problem is why derivative suits of this nature are prohibited. *See id.*

Third, the Court can avoid an analysis of the complicated issues presented by the first two factors because there are, under the Complaint's allegations, directly injured parties. *See id.* Again, as in *Ganim*, the residents of New Haven who purportedly have been directly harmed could themselves seek to "remedy the harms . . . and obtain compensation" without "confronting the enormous difficulties in sorting out the questions of causation and damages demonstrated by the first two factors."[7] *Id.*

[7] The Distributors do not concede, or even suggest, that lawsuits against them by those who claim to have suffered direct personal injury as a result of the Distributors' alleged conduct would be meritorious, but the ability of those persons to attempt to seek their own redress (whether ultimately successful or not) confirms that the City lacks standing.

In short, the City lacks standing to bring this action because its injuries are too far removed from the Distributors' alleged conduct and are, at best, derivative of injuries to the City's residents.

II. The City Otherwise Lacks Standing.

The City also lacks standing to sue the Distributors under either of the two other bases set forth—or at least suggested—in the Complaint.

First, although the City alleges that Connecticut's Home Rule Act, which generally gives a municipality the power to sue and to manage the health and welfare of its residents, confers standing here, Compl. at ¶¶ 20-21, the Connecticut Supreme Court squarely rejected the exact same argument in *Ganim*, holding that the Act does ***not*** confer standing where standing does not otherwise exist.

Second, although the Complaint says in passing that the City brings this action in a "*parens patriae*" capacity, Compl. at ¶ 26, the City lacks statutory authority to do so. The City is a creation of the State and is empowered to act only to the extent provided by law. The State has not authorized the City to bring this action in a *parens patriae* capacity.

A. The Home Rule Act does not provide standing.

"It is settled law that as a creation of the state, a municipality has no inherent powers of its own. . . . A municipality has only those powers that have been expressly granted to it by the state or that are necessary for it to discharge its duties and to carry out its objects and purposes." *See Windham Taxpayers Ass'n v. Bd. of Selectmen of the Town of Windham*, 234 Conn. 513, 528; 662 A.2d 1281 (1995). "The rules that determine whether a power has been delegated to a municipality are also well established. The legislature has been very specific in enumerating those powers it grants to municipalities. . . . An enumeration of powers in a statute is uniformly held to forbid the things not enumerated. . . . Delegation of authority to municipalities is

therefore narrowly construed." *Simons v. Canty*, 195 Conn. 524, 530, 488 A.2d 1267 (1985) (internal citations and quotations marks omitted). In determining whether a municipality has a power to act, the Supreme Court has said: "[W]e do not search for a statutory prohibition against such an enactment; rather, we must search for statutory authority ***for*** the enactment." *Avonside, Inc. v. Zoning & Planning Comm'n of Town of Avon*, 153 Conn. 232, 236, 215 A.2d 409 (1965) (emphasis added).

The City alleges that it brings this action under the Home Rule Act, Compl. at ¶¶ 20-21, just as Bridgeport asserted unsuccessfully in *Ganim*. Specifically, the City asserts authority to:

- "[S]ue and be sued, and institute, prosecute, maintain and defend any action or proceeding in any court of competent jurisdiction," Conn. Gen. Stat. § 7-148(c)(1)(A);
- "Regulate and prohibit the carrying on within the municipality of any trade, manufacture, business or profession which is, or may be, so carried on as to become prejudicial to public health, conducive to fraud and cheating, or dangerous to, or constituting an unreasonable annoyance to, those living or owning property in the vicinity," Conn. Gen. Stat. § 7-148(c)(7)(H)(ii);
- "Preserve the public peace and good order," Conn. Gen. Stat. § 7-148(c)(7)(H)(vii); and
- "Provide for the health of the inhabitants of the municipality and do all things necessary or desirable to secure and promote the public health," Conn. Gen. Stat. § 7-148(c)(7)(H)(vii).

When Bridgeport relied on the same provisions in *Ganim*, the Supreme Court held:

> [***W***]***e cannot read the general provisions of the Home Rule Act on which the plaintiffs rely so as to provide them with standing to bring these specific claims. The general power to sue and be sued does not mean that a municipality may bring a suit that it otherwise would have no standing to bring***. Similarly, the general power to protect the health and welfare of the inhabitants of a

> municipality does not mean that the municipality may bring a suit with that aim that it otherwise would have no standing to bring. These general provisions are designed principally to avoid the necessity of a municipality having to petition to the General Assembly simply to secure the power to do what other corporate bodies would have the power to do. They do not, as the plaintiffs' contention suggests, eliminate the need to inquire whether a municipality has the standing to secure what it seeks to secure by judicial action.

Id. at 367 (emphasis added).

Just as the general provisions of the Home Rule Act did not provide Bridgeport with standing to sue in *Ganim*, these provisions do not provide standing to the City here.

B. The State has not delegated authority to bring *parens patriae* claims.

In a single paragraph of its Complaint, the City asserts that, in addition to seeking recovery for the City's alleged indirect economic losses deriving from harms suffered by its residents, it brings this action in a "*parens patriae*" capacity on its residents' behalf. *See* Compl. at ¶ 26.[8] This allegation does not create a direct injury and is otherwise insufficient to confer standing.

Absent express delegation of authority to a municipality to assert *parens patriae* powers, only the State may assert *parens patriae* claims. *See Carofano v. City of Bridgeport*, 196 Conn. 623, 631, 495 A.2d 1011 (1985) ("[T]he state as *parens patriae* has the ultimate responsibility for protecting the safety of the inhabitants of even a single community . . . ."); *see also Windham Taxpayers Ass'n*, 234 Conn. at 536 ("[M]atters that concern public health and safety and other areas within the purview of a state's police power, have traditionally been viewed as matters of statewide concern."); *United States v. City of Pittsburg*, 661 F.2d 783, 786-87 (9th Cir. 1981)

[8] Tellingly, however, despite purportedly bringing this action on behalf of the residents of New Haven, *all damages sought by the City are for its own municipal expenses*. *See* Compl. at ¶¶ 276-85, 303, 312, 324.

(holding that city did not have standing to raise Fifth Amendment issues *parens patriae* on behalf of citizens); *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 131 (9th Cir. 1973) (recognizing accepted rule that "political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae*"); *United States v. W.R. Grace & Co.-Conn.*, 185 F.R.D. 184, 190 (D. N.J. 1999) ("The doctrine of *parens patriae* does not extend to municipalities, except to the extent that a municipality's own rights are congruent with those of its residents."). Where the legislature intended to allow *parens patriae* actions, it has expressly done so, including, for example, in the antitrust context. *See* Conn. Gen. Stat. § 35-32 (authorizing Connecticut Attorney General to commence *parens patriae* action for antitrust violations).

Because the State has not authorized the City to maintain this lawsuit in a *parens patriae* capacity, the City cannot claim "*parens patriae*" powers, and these alleged powers do not provide a basis for standing. Indeed, in the absence of an explicit delegation of authority to sue on behalf of another, "a party does not have standing to raise another person's rights." *See Third Taxing Dist.*, 35 Conn. App. at 798 (city electors lacked standing to sue on behalf of taxing district).

III. The Municipal Cost Recovery Doctrine Bars This Action.

The City also lacks standing based on the rule, recognized by the trial court in *Ganim*, 1999 WL 1241909, at *6 n.7, that "public expenditures made in the performance of governmental functions are not recoverable." *See also Koch v. Consolidated Edison Co. of N.Y.*, 62 N.Y.2d 548, 468 N.E.2d 1 (1984). In the absence of a specific basis for such recoupment by a city, courts have held that "the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates

the need for the service." *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 323 (9th Cir. 1983).

The rationale for this rule, known as the municipal cost recovery doctrine, or alternatively, the free public services doctrine, is that "[w]here emergency services are provided by the government and the costs are spread by taxes, the tortfeasor does not anticipate a demand for reimbursement. . . . It is critically important to recognize that the government's decision to provide tax-supported services is a legislative policy determination. It is not the place of the courts to modify such decisions." *D.C. v. Air Florida, Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984). Without such a rule, all citizens who call an ambulance, use police or fire services, or otherwise avail themselves of government services would constitute potential tortfeasors.

In *Koch*, the New York Court of Appeals rejected New York City's claim for reimbursement from Con Edison for costs associated with the historic 1977 citywide blackout, including wages, salaries, overtime and other benefits of police, fire, sanitation, and hospital personnel in excess of those costs that would normally have been paid. The court relied on the rule articulated above "that public expenditures made in the performance of governmental functions are not recoverable." *Koch*, 62 N.Y.2d at 560, 561 (also observing that no statutes allow for reimbursement in these circumstances that would justify departure from that rule).

Other courts have recognized the same rule. *See, e.g.*, *State v. Black Hills Power, Inc.*, 2015 Wyo. 99, 354 P.3d 83, 85-87 (2015) (no common-law right of recovery for fire suppression costs); *Town of Freetown v. New Bedford Wholesale Tire, Inc.*, 348 Mass. 60, 423 N.E.2d 997, 997-98 (1981) (precluding plaintiff town's recovery for cost of fire services against defendant who allegedly had dumped tires that caught fire); *Walker County v. Tri-State Crematory*, 284 Ga. App. 34, 643 S.E.2d 324 (2007) (affirming dismissal of suit against county where county "is not

seeking to recover costs associated with injury to its own property, but rather the costs it incurred in performing the public services"); *City of Bridgeton v. B.P. Oil, Inc.*, 146 N.J. Super. 169, 369 A.2d 49, 54 (1976) (city had no right to recover for use of fire services during oil spill: "there remains an area where the people as a whole absorb the cost of such services").

Consistent with these cases, the trial court in *Ganim* dismissed Bridgeport's action for lack of standing in part based on "the general rule prohibiting recoupment of municipal expenditures." *Ganim*, 1999 WL 1241909, at *6 n.7.

The same result is appropriate here. Because no statute empowers a municipality in Connecticut to seek reimbursement for these types of expenses,[9] the municipal cost recovery doctrine bars the City's action seeking recovery of those costs.

IV. The City Lacks Standing to Bring a Claim Under the Connecticut Unfair Trade Practices Act.

Finally, in addition to the more general standing issues discussed above, the City lacks standing to bring its CUTPA claim against the Distributors in Count III because it lacks a business relationship with any of the Distributors and because CUTPA is subject to the remoteness doctrine as a limitation on standing.

"Although our Supreme Court repeatedly has stated that CUTPA does not impose the requirement of a consumer relationship . . . the court also has indicated that a plaintiff must have at least *some* business relationship with the defendant in order to state a cause of action under CUTPA." *Pinette v. McLaughlin*, 96 Conn. App. 769, 778, 901 A.2d 1269 (2006) (internal citation omitted; emphasis in original); *see also Vacco v. Microsoft Corp.*, 260 Conn. 59, 88, 793

[9] By contrast, cost recovery by municipalities is permitted by statute in other situations, such as in the environmental cleanup context. *See, e.g.*, Conn. Gen. Stat. § 22a-452 (entitling municipality to reimbursement of "reasonable costs expended" for "containment, removal, or mitigation, if . . . pollution or contamination or other emergency resulted from the negligence or other actions of such person, firm or corporation").

A.2d 1048 (2002) ("[I]t strains credulity to conclude that CUTPA is so formless as to provide redress to any person, for any ascertainable harm, caused by any person in the conduct of any trade or commerce.").

The trial court in *Ganim* noted the implications for a plaintiff's standing when the requisite business relationship is absent: "CUTPA has its own standing requirements. . . . The act recognizes three categories of plaintiffs: consumers; competitors and other business persons affected by unfair or deceptive acts." 1999 WL 1241909, at *11 (internal citation omitted). On appeal, the Attorney General argued, based on statutory language, that the only requirement for standing under CUTPA was an "ascertainable loss" attributable to the conduct of the defendants. *See Ganim*, 258 Conn. at 372. The Supreme Court found that it did not need to decide the necessity of a business relationship because it held that the "ascertainable loss" requirement in CUTPA does not provide standing where it does not otherwise exist, just as the Home Rule Act provisions do not confer standing. The Court held that "the ascertainable loss requirement of CUTPA does not displace the remoteness doctrine as a standing limitation, and that the same reasons of remoteness and derivativeness that we have explained earlier apply to the CUTPA claim." *Id.* The Court also warned that finding standing under CUTPA would lead to potentially limitless liability:

> If the only standing requirement under CUTPA were that, as a result of the defendant's prohibited conduct, the plaintiff suffered an "ascertainable loss of money or property" . . . then any plaintiff who could, in a "but for" cause sense, trace his or her loss to the defendant's wrongful conduct, would have standing to assert a CUTPA claim against the defendant, irrespective of how remote or derivative that loss was. That would render CUTPA subject to yielding bizarre results.

Id. at 373.[10]

Here, the City has not alleged and cannot allege that it has a business relationship with wholesale distributors of prescription opioids, and even if it could, the CUTPA claim is subject to the overriding remoteness doctrine. The City therefore also lacks standing to bring the CUTPA claim against the Distributors.

CONCLUSION

Because the City lacks standing to assert the claims in its Complaint, the Distributors respectfully move the Court to dismiss the City's Complaint dated October 25, 2017.

[10] The Court included an illustrative hypothetical: "Consider, for example, that deceitful merchant A causes B to lose a great deal of money, as a result of which B defaults on a large loan from C, as a result of which C's business fails, as a result of which C's creditors D, E, F and G each suffers an ascertainable loss of money. Under the reasoning employed by the attorney general, not only B, but C, D, E, F and G—and others down the line from G—would have standing to sue A under CUTPA. We do not think that the legislature intended such a bizarre result simply because CUTPA is remedial in nature." *Id.* at 373 n.21.

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CERTIFICATE OF SERVICE

I certify that a copy of the above was or will immediately be mailed or delivered electronically or non-electronically on January 4, 2018, to all counsel and self-represented parties of record and that written consent for electronic delivery was received from all counsel and self-represented parties of record who were or will immediately be electronically served.

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